(2)

No. 94-1053

Supreme Court, U.S.
FILED
FEB 16 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

BARRY WILLIAM LEVINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARLIN M. ADAMS
Independent Counsel
Washington, D.C. 20001

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

15 pp

QUESTIONS PRESENTED

1. Whether the district court properly used its summary contempt powers to find petitioner guilty of contempt based on his conduct during a trial.

2. Whether the district court should have referred the question of petitioner's contempt to another judge for a hearing.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Harris v. *United States*, 382 U.S. 162 (1965)	2
Holloway, In re:	
995 F.2d 1080 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 1537 (1994)	5, 7
114 S. Ct. 1537 (1994) (No. 93-966)	6
Hudgings, Ex parte, 249 U.S. 378 (1919)	8
International Union, UMW v. *Bagwell*, 114 S. Ct. 2552 (1994)	8
Mayberry v. *Pennsylvania*, 400 U.S. 455 (1971)	10
McConnell, In re, 370 U.S. 230 (1962)	3, 8
McDonald, In re, 819 F.2d 1020 (11th Cir. 1987)	6
Nakell v. *Attorney General of North Carolina*, 15 F.3d 319 (4th Cir.), cert. denied, 115 S. Ct. 184 (1994)	10
Offutt v. *United States*, 348 U.S. 11 (1954)	10
SEC v. *Simpson*, 885 F.2d 390 (7th Cir. 1989)	10
Sandstrom v. *Butterworth*, 738 F.2d 1200 (11th Cir. 1984), cert. denied, 469 U.S. 1109 (1985)	10
Taylor v. *Hayes*, 418 U.S. 488 (1974)	7, 9
Terry, Ex parte, 128 U.S. 289 (1888)	8
Ungar v. *Sarafite*, 376 U.S. 575 (1964)	9, 10
United States v. *Meyer*, 462 F.2d 827 (D.C. Cir. 1972)	5
United States v. *Moschiano*, 695 F.2d 236 (7th Cir. 1982), cert. denied, 464 U.S. 831 (1983)	6-7
United States v. *Wilson*, 421 U.S. 309 (1975)	6, 8
United States v. *Wilson*, 26 F.3d 142 (D.C. Cir. 1994)	2

Statutes and rules: Page

18 U.S.C. 201(c)(1)(A) 2
18 U.S.C. 401(1) 7
18 U.S.C. 401(1)-(3) 7
18 U.S.C. 401(3) 2, 4, 7
28 U.S.C. 592 2
Fed. R. Crim. P.:
Rule 42(a) 2, 4, 6
Rule 42(b) 4

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1053

BARRY WILLIAM LEVINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 27 F.3d 594. The order of the district court (Pet. App. 10a-61a) is reported at 839 F. Supp. 36.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1994. A petition for rehearing was denied on September 15, 1994. Pet. App. 63a. The petition for a writ of certiorari was filed on December 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a criminal defense lawyer, was summarily held in criminal contempt under Fed. R. Crim. P. 42(a) and 18 U.S.C. 401(3) during a criminal trial in the United States District Court for the District of Columbia.[1] He was sentenced to four hours' imprisonment. Pet. App. 62a. The court of appeals affirmed. *Id.* at 1a-9a.

1. During the trial, petitioner repeatedly ignored the district court's orders. The last instance occurred on November 19, 1992, the 34th day of trial, when petitioner stated in the jury's presence that a prosecution witness was changing her testimony. The district court summarily held petitioner in contempt. Pet. App. 1a-2a.

The district court entered a written order that certified that petitioner's contemptuous conduct was committed in the presence of the court and that the court had personally observed it. Pet. App. 10a. The court recognized that summary contempt under Rule 42(a) "is an extraordinary power that must be reserved for 'exceptional circumstances.'" Pet. App. 10a (quoting *Harris* v. *United States*, 382 U.S. 162, 164 (1965)). In particular, the court stated that summary contempt is appropriate only when there is "a compelling need for an

---

[1] The trial was *United States* v. *Briscoe*, Crim. Nos. 91-399-SSH & 92-86-SSH (D.D.C.). The three defendants in that case were convicted of accepting illegal gratuities, in violation of 18 U.S.C. 201(c)(1)(A), and the convictions of two of the three were affirmed. *United States* v. *Wilson*, 26 F.3d 142 (D.C. Cir. 1994). The prosecutions arose out of separate but related investigations by Independent Counsel Arlin M. Adams (see 28 U.S.C. 592) and the United States Attorney for the Southern District of Florida. The investigations led to separate indictments returned in the District of Columbia and the Southern District of Florida. The indictments were consolidated for the trial in which petitioner was held in contempt. See *Wilson*, 26 F.3d at 145-146; Pet. App. 12a n.2.

immediate remedy or time [is] of the essence," and "there has been an 'actual obstruction of justice'." *Ibid.* (quoting *In re McConnell*, 370 U.S. 230, 234 (1962)).

The court held that those exceptional circumstances were present here. The court explained that petitioner had "continually defied the Court's explicit and direct orders," even after "numerous, unequivocal warnings that persistence in his course of conduct would result in a finding of contempt." Pet. App. 11a. As part of its order, the court set out "only selected instances from the two weeks of trial immediately preceding" the contempt finding, in each of which petitioner had "persisted in a course of conduct in defiance of a previous ruling of the Court." *Id.* at 12a-13a.[2]

The court also determined that "summary procedures are necessary in this case." Pet. App. 12a. Observing that the trial involved three defendants and ten attorneys, the court determined that "[u]nless the Court took a significant, immediate step to deter the misconduct of [petitioner], this already protracted and extraordinarily unpleasant trial, which is now entering its ninth week, risks becoming unmanageable." *Ibid.*

2. On appeal, petitioner argued that his conduct did not warrant a finding of contempt, that the district court should not have used its summary contempt powers, and that any contempt proceeding should have been held before a different judge. The court of appeals rejected

---

[2] In addition to setting out portions of the trial transcript from the preceding two weeks, the court incorporated the entire record by reference, explaining that it could not "feasibly list every one of the numerous instances of [petitioner's] misconduct," and that "a written transcript cannot capture adequately the tone and behavior of [petitioner]." Pet. App. 12a-13a.

those arguments and affirmed his conviction. Pet. App. 1a-9a.

The court of appeals held that the evidence supported a finding of contempt under 18 U.S.C. 401(3), which authorizes a court to punish as contempt "[d]isobedience or resistance to [the court's] lawful writ, process, order, rule, decree, or command." Pet. App. 3a. The court noted that the finding was prompted by petitioner's defiance of a trial court ruling, in which petitioner repeatedly questioned a witness about an exhibit known as "Briscoe 46" after the court had ruled it inadmissible, had repeated that ruling several times, and had repeatedly directed petitioner to move on to another topic. *Id.* at 3a-5a. The court of appeals determined that the trial court's ruling on Briscoe 46 was clear, and that petitioner's defiance of that ruling was willful. *Id.* at 4a-6a. In connection with its willfulness determination, the court of appeals found that petitioner "intentionally circumvented the [trial] court's orders in order to make the jury aware of a document the court had ruled inadmissible." *Id.* at 5a-6a.

The court of appeals next held that the district court did not abuse its discretion by using the summary procedures of Rule 42(a) instead of the notice and hearing procedures of Rule 42(b). Pet. App. 6a-7a.[3] The

---

[3] Federal R. Crim. P. 42 provides in pertinent part:

(a) **Summary Disposition.** A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. * * *

(b) **Disposition Upon Notice and Hearing.** A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of

court of appeals noted that, in *In re Holloway*, 995 F.2d 1080 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 1537 (1994), it had "approved summary contempt proceedings because the trial judge had warned the defendant to heed her rulings on pain of contempt; had repeated several times the threshold showing necessary to proceed with a particular line of questioning; and had warned the defendant that his continued inquiries violated the court's order." Pet. App. 7a (citing *Holloway*, 995 F.2d at 1087). The court of appeals determined that "[t]he same factors appear here." *Ibid.* The court concluded that petitioner's "blatant disregard for the court's authority, thereby threatening its ability to ensure an orderly and fair trial, justified a summary finding of contempt." *Ibid.*

Finally, the court of appeals held that the district court judge had not become "personally embroiled" in the controversy with petitioner, and that it therefore was not necessary to refer the contempt issue to another judge. Pet. App. 7a-9a. The court of appeals determined that, "[a]lthough [petitioner] questioned the trial judge's impartiality, there is nothing in the record indicating any bias or partiality on the trial judge's part; on the contrary, the record manifests an extremely patient district judge ultimately driven to use his contempt power." *Id.* at 8a. The court of appeals also noted that, in *United States* v. *Meyer*, 462 F.2d 827 (D.C. Cir. 1972), it had stated that "the need to preserve order" may "outweigh[] the possibility of bias on the part of the trial judge," so as to justify a summary finding of contempt even if "the judge has evidenced personal embroilment." Pet. App. 8a (quoting *Meyer*, 462 F.2d at 843). The court

---

the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. * * *

of appeals in this case repeated, however, that "[n]othing in this record * * * indicates that the judge was personally upset by or indeed anything but patient with [petitioner]." Pet. App. 9a.

ARGUMENT

1. Petitioner contends (Pet. 8-12) that the district court erred by using its summary contempt power under Fed. R. Crim. P. 42(a) to punish his course of defiant conduct during the trial. The Court recently denied review of this same issue in *In re Holloway*, cert. denied, 114 S. Ct. 1537 (1994) (No. 93-996), and there is no reason for a different result here.

Rule 42(a) states that a criminal contempt "may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." Petitioner does not dispute that the judge saw and heard the conduct on which its contempt finding was based, and that the conduct occurred in the court's presence. Instead, petitioner argues (Pet. 9-12) that, in addition to the requirements set forth in Rule 42(a), an actual obstruction of justice is a prerequisite to the use of summary contempt procedures. That argument does not warrant further review, because both courts below properly determined that petitioner had caused such an obstruction.

The district court found that petitioner's contumacious conduct threatened to make the already lengthy trial unmanageable. Pet. App. 12a. The determination whether to impose summary contempt under Rule 42(a) rests in the discretion of the district court, see *United States* v. *Wilson*, 421 U.S. 309, 316-317 (1975); *In re McDonald*, 819 F.2d 1020, 1024 (11th Cir. 1987) (per curiam); *United States* v. *Moschiano*, 695 F.2d 236, 251-

252 (7th Cir. 1982), cert. denied, 464 U.S. 831 (1983), and the district court here acted within its discretion. Petitioner ignored the court's authority in front of the jury, repeatedly asked the witnesses questions that the court had already ruled improper, and forced the court to hold repetitious bench conferences and issue repetitious directives about petitioner's examination. See, *e.g.*, Pet. App. 14a-60a.

The substantive bases for criminal contempt are set forth in 18 U.S.C. 401(1) through (3). Because the district court did not specify which subsection of Section 401 covered petitioner's contempt, the court of appeals considered that issue as a threshold matter. See Pet. App. 2a-3a. The court of appeals determined that petitioner's conviction was based on 18 U.S.C. 401(3), which covers "[d]isobedience or resistance to [a court's] lawful writ, process, order, rule, decree, or command." Pet. App. 3a. The court of appeals held (*id.* at 3a n.1) that it "[wa]s not necessary to find" that petitioner's behavior "actually 'obstruct[ed] the administration of justice,'" as required by Section 401(1). That holding was in accord with *In re Holloway*, 995 F.2d 1080, 1082 n.1 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 1537 (1994).

The question whether petitioner's conduct must have obstructed justice to violate 18 U.S.C. 401(3), however, is distinct from the question whether obstruction of justice is a prerequisite to the use of summary contempt procedures under Rule 42(a). The court of appeals addressed the latter question in a separate section of its opinion. Pet. App. 6a-7a. In that section, the court pointed out that, when a judge observes a contempt in the court's presence, the judge may punish it summarily to preserve order. *Id.* at 7a; see *Taylor* v. *Hayes*, 418 U.S. 488, 497 (1974). On the facts of this case, the court held

that a summary finding of contempt was necessary to preserve order (Pet. App. 7a):

> The judge frequently warned [petitioner] to heed his rulings and threatened him with contempt * * *; the judge told [petitioner] that the witness could not testify about Briscoe 46, * * *; and the judge reminded [petitioner] several times that he had already decided the inadmissibility of Briscoe 46. * * * Despite his diligent efforts, none of his warnings to [petitioner] worked—[petitioner] continued to disregard the court's orders and evidentiary rulings. In our view, [petitioner's] blatant disregard for the court's authority, thereby threatening its ability to ensure an orderly and fair trial, justified a summary finding of contempt; we therefore find no abuse of discretion.

Thus, the court of appeals held that summary contempt was warranted because petitioner's conduct actually disrupted the trial. It therefore plainly found "an actual obstruction of justice." *In re McConnell*, 370 U.S. 230, 234 (1962); *Ex parte Hudgings*, 249 U.S. 378, 383 (1919); *Ex parte Terry*, 128 U.S. 289, 303, 307 (1888); see *Wilson*, 421 U.S. at 316 ("The face-to-face refusal to comply with the court's order itself constituted an affront to the court, and when that kind of refusal disrupts and frustrates an ongoing proceeding, as it did here, summary contempt must be available to vindicate the authority of the court.") (footnote omitted).

Petitioner contends (Pet. 9) that the court of appeals' decision conflicts with decisions of this Court, including *International Union, UMW* v. *Bagwell*, 114 S. Ct. 2552 (1994), and those of other courts of appeals. That claim is based on his erroneous view that, in affirming the use of summary proceedings, the court of appeals did not find

any actual obstruction of justice. Because the court of appeals did so find, petitioner's claim of a conflict is unfounded.

2. Petitioner also argues (Pet. 12-21) that the district judge became "personally embroiled" with petitioner and therefore should have referred the question of contempt to another judge. That factbound claim lacks merit.

The Court has recognized that, when contemptuous conduct causes a judge to become personally embroiled with the contemnor, the judge should excuse himself from the contempt proceedings. *Taylor* v. *Hayes*, 418 U.S. at 501. At the same time, however, the Court has made clear that not all contemptuous conduct prevents a judge from trying the person for contempt. In *Ungar* v. *Sarafite*, 376 U.S. 575 (1964), the Court held that a judge was not disqualified from trying a witness for contempt despite the witness's continued criticism of the judge, disobedience to his orders during trial, and "disruptive, recalcitrant and disagreeable commentary." *Id.* at 584. Even though that conduct offered a "possible temptation" to be biased against the defendant, the Court found that the judge had not become "personally embroiled" with the litigant, and the Court refused to "assume that judges are so irascible that they cannot fairly deal with resistance to their authority or with highly charged arguments about the soundness of their decisions." *Ibid.*

Here, petitioner did not personally attack the judge; he simply disregarded the court's orders and, in the process, challenged the soundness of its rulings.[4] Under

---

[4] For example, in the portion of the transcript that petitioner asserts (Pet. 14 n.9) shows that the district judge felt that his integrity was under attack, petitioner complained that the court had consistently overruled petitioner's objections, Pet. App. 23a. Rather than taking that complaint personally, the court responded

Ungar, mere "disobedience to court orders and criticism of its rulings during the course of a trial" are not enough to warrant disqualification. 376 U.S. at 584; accord *Nakell* v. *Attorney General of North Carolina*, 15 F.3d 319, 325 (4th Cir.), cert. denied, 115 S. Ct. 184 (1994); *SEC* v. *Simpson*, 885 F.2d 390, 398 (7th Cir. 1989). Hence, the district judge in this case was not required to disqualify himself.[5]

---

that petitioner "ha[d] not made very good objections," and was "perfectly entitled to make a record." *Ibid.*

[5] Petitioner argues (Pet. 16, 18, 19) that the decision below conflicts with *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971). In that case, the trial judge waited until the end of trial to find one of the defendants in contempt for his outbursts during trial. *Id.* at 463-464. The defendant also vilified the judge so repeatedly that the judge could not remain personally detached. *Id.* at 465-466. Neither of those circumstances obtained here. Moreover, the Court in *Mayberry* said that the trial judge in that case "could, with propriety, have instantly acted, holding petitioner in contempt," instead of waiting until after the trial. *Id.* at 463. Thus, *Mayberry* supports the judgment below. Likewise, in *Offutt* v. *United States*, 348 U.S. 11 (1954), the district judge waited until the end of trial to find a lawyer in contempt, and the judge clearly stepped over the line of impartiality, for he repeatedly yelled at the lawyer. *Id.* at 12, 15-16 & n.2. In contrast, the district judge in this case exercised the contempt power during the trial and, as the court of appeals observed, exhibited exemplary patience. Pet. App. 8a-9a. Finally, *Sandstrom* v. *Butterworth*, 738 F.2d 1200 (11th Cir. 1984), cert. denied, 469 U.S. 1109 (1985), cited by petitioner (Pet. 18, 19, 20), supports the judgment below, for the court of appeals there acknowledged that in most cases, a trial judge's summary contempt ruling during trial is not subject to reversal unless the contemnor shows that the judge bore personal animosity towards the defendant. 738 F.2d at 1213-1214.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARLIN M. ADAMS
Independent Counsel
Washington, D.C. 20001

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

FEBRUARY 1995